IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION 07-0342-WS-C
	)	
RICHARD ALLEN, etc., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on the defendants' motion to dismiss. (Doc. 15). The plaintiff has filed a response and the defendants a reply, (Docs. 17, 18), and the motion is ripe for resolution. After carefully considering the foregoing and other relevant materials in the file, the Court concludes that the motion to dismiss is due to be granted.

The salient, undisputed facts are these: In January 1992, the plaintiff was sentenced to death (for the third time) for a murder committed in 1982. His conviction and sentence became final in approximately June 1998, and his state collateral proceedings became final in May 2002.

In July 2002, Alabama adopted lethal injection as its method of execution, applicable to all existing death row inmates who did not opt for electrocution within thirty days. The plaintiff did not opt for electrocution.

The plaintiff filed a federal habeas petition in April 2001, which the trial court dismissed as untimely in December 2002. The Eleventh Circuit affirmed in June 2006, which opinion was modified slightly on petition for rehearing and rehearing en banc in August 2006. The dismissal of the plaintiff's federal habeas petition became final on April 16, 2007, when the Supreme Court denied his petition for writ of certiorari. The state filed a motion to set an execution date the next day. The Alabama Supreme Court granted the motion on June 22, 2007, setting an execution date of September 27, 2007.

The plaintiff filed this Section 1983 action on May 14, 2007, challenging the constitutionality of Alabama's lethal injection protocol, in particular its use of a three-drug sequence including a short-acting anesthetic (sodium pentothal), a drug inducing muscle paralysis (pancuronium bromide), and a final, lethal drug (potassium chloride); its procedures (or lack thereof) for their administration; and its standards (or lack thereof) for persons involved in the execution process. All allegations concerning the protocol are made "upon information and belief." The plaintiff seeks to "enjoin Defendants from executing Plaintiff with inadequate anesthesia and execution procedures that violate the Eighth Amendment prohibition against cruel and unusual punishment." (Doc. 1).

The defendants do not dispute that the plaintiff's claim is properly characterized as a challenge to the conditions of confinement under Section 1983 and not as a successive habeas petition. *See generally Hill v. McDonough*, 126 S. Ct. 2096 (2006) (holding that a challenge to Florida's three-drug lethal injection protocol could be brought under Section

1983). Instead, they argue that the plaintiff's claim: (1) is barred by the statute of limitations; (2) is barred by the doctrine of laches; and (3) fails to state a claim upon which relief can be granted. Because it is dispositive, the Court addresses only the second of these arguments.

"Injunctive relief is an equitable remedy that is not available as a matter of right." *Grayson v. Allen*, 2007 WL 2027903 at *3 (11th Cir.), *cert. denied*, 2007 WL 2086662 (2007). When the equitable relief sought is a stay of execution, sensitivity to the state's "strong interest in enforcing its criminal judgments without undue interference from the federal courts" requires the federal courts to "apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Jones v. Allen*, 485 F.3d 635, 638 (11th Cir.) (internal quotes omitted), *cert. denied*, 127 S.Ct. 2160 (2007). The same equitable principles, and the same strong presumption, obtain when the equitable relief sought is an injunction. *Grayson*, 2007 WL 2027903 at *3; *accord Rutherford v. McDonough*, 466 F.3d 970, 976 (11th Cir.) ("*Rutherford II*"), *cert. denied*, 127 S.Ct. 465 (2006).

The initial question, then, is whether the plaintiff "unreasonably delayed" in filing this action. *Grayson*, 2007 WL 2027903 at *3, *6. There are at least four possibilities for excusing the plaintiff's delay of almost five years following Alabama's adoption of lethal injection as its method of

execution,[1] but none of them could suffice to defeat the defendants' motion to dismiss.

First, the plaintiff could plead reasonable ignorance of Alabama's lethal injection protocol. In this regard, the complaint alleges that, "[u]pon information and belief, Alabama's execution procedures are deemed confidential, and the Defendants will not publicly disclose any details about the procedures involved in carrying out executions in Alabama." (Doc. 1 at 6, ¶ 19).[2]

The Eleventh Circuit, however, has rejected the proposition that the confidentiality of the protocol excuses a plaintiff's delay, for reasons largely present here. As in *Jones*, any assertion of reasonable ignorance "is belied by [the plaintiff's] complaint, which alleges 'upon information and belief" that Alabama uses the three-drug cocktail; "[t]hus, [the plaintiff] knew of the basis of his claim before he filed his complaint." 485 F.3d at 640 n.3.[3] Also as in

---

[1] There may be others (such as, perhaps, a sufficiently debilitating physical or mental condition), but the plaintiff asserts none. Indeed, he does not clearly assert any of the four possibilities discussed in text, but the Court addresses them because they appear in recent Eleventh Circuit opinions.

[2] Notably, the complaint does not allege that, despite the protocol's confidential nature, the plaintiff and his counsel were until recently ignorant about it. Likewise, the plaintiff in brief describes the protocol as "secretive" and asserts that the state "refuses to provide even the most basic information about these procedures," but he does not assert that he was unable to obtain this information through other means. (Doc. 17 at 11-12).

[3] As in *Jones*, *id.*, despite general allegations about staffing and training, the "crux" of the plaintiff's complaint is that the

Jones, the plaintiff "knew or should have known before 2006 that the State uses the same three-drug cocktail as nearly every other state where substantially similar challenges have been made." *Id.* The plaintiff should have known this from the published report, in February 2006, that of the 37 states employing lethal injection, 35 used the same three-drug cocktail. *Evans v. Saar*, 412 F. Supp. 2d 519, 522 (D. Md. 2006). As discussed below, the ingredients of that cocktail had been identified in *Evans* and numerous other published opinions before 2007.

The *Grayson* Court followed *Jones*, concluding that allegations in the complaint substantively identical to those in *Jones* and this case "belied" the plaintiff's "assertion that he was unaware of Alabama's three-drug protocol." 2007 WL 2027903 at *5 & n.3. The *Grayson* Court also concluded that, since the plaintiff's allegations were based "on information and belief" rather than knowledge, "there is no reason why [he] could not have filed a similar § 1983 complaint based 'upon information and belief months, if not years, earlier." *Id.* Because this plaintiff pleads based on information and belief, *Grayson's* reasoning applies here as well.

The plaintiff's case for reasonable ignorance is even weaker than that of the plaintiffs in *Jones* and *Grayson*. As he acknowledges, (Doc. 17 at 13), a number of Alabama cases substantively similar to the plaintiff's were filed in 2006. Each of them contains the allegation that Alabama employs the

---

cocktail runs an unacceptable risk of causing the execution to be accompanied by agonizing pain and conscious suffocation.

same three-drug cocktail the plaintiff now alleges. *McNair v. Allen*, 2:06-cv-696-WKW (M.D. Ala.) (filed August 7, 2006); *Callahan v. Allen*, 2:06-cv-919-WKW (M.D. Ala.) (filed October 11, 2006); *Jones v. Allen*, 2:06-cv-1032-MHT (M.D. Ala.) (filed November 1, 2006); *Grayson v. Allen*, 2:06-cv-1032-WKW (M.D. Ala.) (filed November 17, 2006). If the plaintiffs in these cases were able to make this allegation in the summer and fall of 2006, there can be no good reason the plaintiff here could not have made the same allegation long before May 2007. *See Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir.) (given that a fellow prisoner had challenged Florida's lethal injection protocol years before, "Hill cannot claim that it was impossible for him to initiate his federal suit any earlier."), *cert. denied*, 127 S.Ct. 465 (2006). Even assuming that the plaintiffs in these cases had access to sources that this plaintiff did not, once the complaints were filed they were publicly available online, and little effort would have been required to locate them through the CM/ECF system. At least after *Hill* was handed down in June 2006, there was every incentive to do so.[1]

A second possible basis for excusing the plaintiff's delay would be reasonable ignorance that Alabama's protocol is potentially subject to constitutional challenge. The plaintiff makes no such argument, and it would not succeed if he did. By 2004, there were at least four published cases raising the same challenges to the three-drug protocol as the plaintiff

---

[1] The plaintiff has been represented by current counsel since at least September 2002. *Arthur v. Haley*, 2:01-cv-00983 (N.D. Ala.) (Doc. 50).

mounts. *See Jones v. Allen*, 483 F. Supp. 2d 1142, 1153 (M.D. Ala. 2007) (citing *Cooper v. Rimmer*, 358 F.3d 655 (9th Cir. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004); *State v. Webb*, 750 A.2d 448 (Conn. 2000); and *Sims v. State*, 754 So. 2d 657 (Fla. 2000)). The Eleventh Circuit in *Jones* held that these four cases were sufficient to support a finding that the plaintiff was or should have been aware of the risks of the cocktail and of a potential challenge to the procedure "well before he filed suit" in November 2006. 485 F.3d at 640 n.3.[5]

The four cases cited in *Jones* are only the tip of the iceberg. What follows is a sampling of opinions articulating plaintiffs' arguments similar to those the plaintiff raises here that were published prior to *Hill* (a comparable list of unpublished opinions can be located online with dizzying speed): *Taylor v. Crawford*, 445 F.3d 1095, 1097 (8th Cir. 2006); *Rutherford v. Crosby*, 438 F.3d 1087, 1094 (11th Cir. 2006) ("*Rutherford II*"); *Morales v. Hickman*, 438 F.3d 926, 927 (9th Cir. 2006); *In re: Williams*, 359 F.3d 811, 814 (6th Cir. 2004) (Suhrheinrich, J., concurring); *Robinson v. Crosby*, 358 F.3d 1281, 1285 n.4 (11th Cir. 2004); *Cooey v. Taft*, 430 F. Supp. 2d 702, 706-07 (S.D. Ohio 2006); *Crowe v. Head*, 426 F. Supp. 2d 1310, 1353 (N.D. Ga. 2005); *Bell v. True*, 413 F. Supp. 2d 657, 736 (W.D. Va. 2006); *Evans v. Saar*, 412 F. Supp. 2d 519, 521 (D. Md. 2006); *Reid v. Johnson*, 333 F. Supp. 2d 543, 548 (E.D. Va. 2004); *Bieghler v. State*, 839 N.E.2d 691, 695 (Ind. 2005); *Abdur'Rahman v. Bredesen*, 181 S.W.2d 292, 302

---

[5] The *Jones* Court did not require any showing that the plaintiff or his counsel were actually aware of these cases.

(Tenn. 2005); *Ex parte O'Brien*, 190 S.W.2d 677, 678 (Tex. Crim. App. 2006) (Cochran, J., concurring). A fair number of these cases identified experts supporting the plaintiffs' claims. The volume of cases raising challenges similar to the plaintiff's naturally rose following *Hill*, including the four filed in the Middle District of Alabama within a few months thereafter. Indeed, *Hill* standing alone strips away any argument of reasonable ignorance of a possible constitutional challenge, since it repeated the standard allegations concerning the three-drug cocktail in a national forum. 126 S. Ct. at 2100.

A third argument for excusing the plaintiff's delay would be that he could not pursue his claim before *Hill* was decided, since Eleventh Circuit precedent held that such a claim could be maintained only under Section 2254. The plaintiff does not make this argument, and the *Grayson* Court rejected it on two grounds, both applicable here. First, nothing precluded the plaintiff from filing suit to challenge the Eleventh Circuit rule, as indeed the *Hill* plaintiff did. Second, even if pre-*Hill* delay could be excused by the adverse appellate precedent, the *Grayson* plaintiff delayed five more months after *Hill* was decided, and ten months after certiorari was granted. 2007 WL 2027903 at *4. The plaintiff here, who filed suit more than six months after the plaintiff in *Grayson*, can fare no better than his predecessor.

Finally, a plaintiff could argue (though the plaintiff has not) that it would have been premature to file suit before the denial of his habeas petition became final upon the denial of certiorari. The Eleventh Circuit has declined to determine precisely when such a suit becomes ripe, but it has clearly rejected the notion that denial of certiorari is

required. On the contrary, the *Jones* Court stated that, "given the extremely small chance of securing certiorari review ..., it was all but guaranteed that [the plaintiff] would die by lethal injection" once the appellate court denied relief. 485 F.3d at 639 n.2. That date arrived in this case in August 2006, some nine months before the plaintiff filed suit.

In light of the above, it is clear that the plaintiff unreasonably delayed in filing this action. The second question that must be answered in determining if a "strong presumption" against a stay should be applied is whether the plaintiff's claim "could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Assuming without deciding that the same question must be answered when the plaintiff seeks not a stay but injunctive relief, the answer is plainly in the affirmative. The latest date on which the plaintiff's unreasonable delay began (and this requires the generous assumption that the plaintiff remained reasonably ignorant of Alabama's three-drug cocktail until fellow Alabama prisoners began filing suit) is on or shortly after August 7, 2006. The plaintiff's scheduled execution date is September 27, 2007, over a year later. Discovery, the dispositive motions and/or evidentiary hearing that would ensue, the Court's ultimate ruling, and any appeal thereof, could have been accomplished within this time frame. *See Rutherford II*, 466 F.3d at 974 (court considers the time needed for "discovery, evidentiary hearing, and decision on the merits"); *Jones*, 485 F.3d at 639 n.2 (court considers the time needed for appeal).

Because the plaintiff unreasonably delayed in bringing this action, and because, but for that delay,

his claim could have been resolved on the merits without impacting his scheduled execution date, the Court must indulge a "strong presumption" against the grant of injunctive relief. It is incumbent upon the plaintiff to overcome this presumption, but he has not attempted to do so.

The circumstances of this case in fact bolster, rather than mitigate, the presumption. First, the plaintiff's unreasonable delay has made the difference in whether or not his claim can be resolved on the merits before his scheduled execution date. By delaying his suit until May 2007, the plaintiff left an impossibly short four months for the entire process.[6] The plaintiff's unreasonable delay is thus far from harmless.

Second, the plaintiff did not file this action until after the Supreme Court had denied certiorari on his habeas petition, even though, once the Eleventh Circuit denied rehearing and rehearing en banc in

---

[6] The inadequacy of four months to resolve such a case is captured by the actual sequence of events in this litigation, which reflects no unusual delays (except perhaps with respect to service of process). The complaint was filed on May 14, 2007, and process was served two weeks later. (Doc. 10-11). The defendants received a one-week extension to file a responsive pleading, due to three other lethal injection cases (including *Grayson*) with pressing briefing deadlines. (Docs. 13-15). The motion to dismiss was filed on June 25, the plaintiff's opposition on July 16, and the defendants' reply on July 26. (Docs. 15, 17, 18). The Court's resolution of the motion comes two weeks after it became ripe. Were the motion denied, only seven weeks would remain before the plaintiff's scheduled execution date in which to conduct discovery, entertain dispositive motions and/or hold an evidentiary hearing, enter a ruling, and perfect and conclude an appeal.

August 2006, "it was all but guaranteed that [he] would die by lethal injection," and even though such a delayed filing "is simply too late to avoid the inevitable need for a stay of execution." *Jones*, 485 F.3d at 639 n.2. Such conduct "leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out." *Id.* at 640 (internal quotes omitted); *accord Grayson*, 2007 WL 2027903 at *7 ("If Grayson truly had intended to challenge Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule."). The equitable pendulum thus swings even further away from the plaintiff.

The plaintiff complains that laches "requires the Court to engage in a fact-specific inquiry that is inappropriate at this stage of the litigation" and must await a motion for summary judgment. (Doc. 17 at 8, 25). As a threshold matter, the equitable timeliness of the plaintiff's complaint is not measured by traditional laches principles but by the specialized "equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges." *Grayson*, 2007 WL 2027903 at *3.[7] Moreover, the

[7] Thus, the defendants need not show the "undue prejudice" that is an element of laches, "classic elements" of which "include unavailability of witnesses, changed personnel, and the loss of pertinent records." *Equal Employment Opportunity Commission v. Dresser Industries, Inc.*, 668 F.2d 1199, 1203 (11th Cir. 1982) — matters which prejudice a defendant in his ability to defend the litigation. Of course, the equitable principles in play here do not ignore prejudice but find it, as a

mere fact that the defendants characterized their defense as one of laches does not justify ignoring the specialized principles in favor of the traditional laches approach.[8]

Nor is there any impediment to resolving the timeliness issue on motion to dismiss. In *Rutherford I* and *II*, the Eleventh Circuit upheld the trial court's dismissal of the plaintiff's complaint the day after it was filed. *Rutherford v. Crosby*, 2006 WL 228883 (N.D. Fla. 2006). This is not surprising, since the relevant facts made the focus of *Jones*, *Grayson*, *Rutherford II* and *Hill* are based on the complaint, the procedural history, and publicly available sources. The plaintiff insists that resolution of the defendants' motion is premature because his "knowledge of the facts underlying this action is disputed." (Doc. 17 at 26). The inquiry, however, is

---

matter of law, in the damage caused by an unreasonably delayed Section 1983 challenge to the interests of the state and victims "in the timely enforcement of a sentence." *Jones v. Allen*, 485 F.3d at 638 (internal quotes omitted); *accord Grayson*, 2007 WL 2027903 at *8. It is precisely the prejudice to these interests that compels a presumption against injunctive relief when the plaintiff unreasonably delays bringing suit. *Id.* at *3.

[8] This is clearly seen in *Grayson*, where the defendants articulated their defense as one of laches, *Jones v. Allen*, 2007 WL 1491009 at *3 (M.D. Ala. 2007), the district court analyzed it as such, *id.* at *5-11, and the Eleventh Circuit then merely noted this history and thereafter ignored laches altogether. 2007 WL 2027903 at *3; *see also Williams v. Allen*, 2007 WL 2206816 at *3-4 (M.D. Ala. 2007) (although the defendants called their defense one of laches, the district court instead followed the "well-established equitable principles" of *Grayson* and other cases).

what he (or his counsel) knew or "should have known," and what they should have known is established by sources independent of the plaintiff. Moreover, postponing resolution of the timeliness issue in this fashion would effectively eviscerate the *Hill* Court's admonition that "federal courts can and should protect States from dilatory or speculative suits." 126 S.Ct. at 2104. The plaintiff's suggested procedure would enable any prisoner to file a Section 1983 challenge shortly prior to his execution date with confidence that the court, unable to rule quickly on a timeliness objection, would be required to enter a stay of execution.[9] The perversity of this result would alone compel rejection of the plaintiff's proposal.

For the reasons set forth above, the defendants' motion to dismiss is **granted**. Judgment shall be entered accordingly by separate order.

DONE and ORDERED this 10th day of August, 2007.

s/ WILLIAM H. STEELE
UNITED STATES
DISTRICT JUDGE

---

[9] Because the timeliness of a request for stay is measured the same as the timeliness of a request for injunctive relief, the court could not refuse a stay any more quickly than it could dismiss the case.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13929

D.C. Docket No. 07-00342-CV-WS-C

THOMAS D. ARTHUR,

Plaintiff-Appellant,

Versus

RICHARD ALLEN,
GRANTT CULLIVER,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

---

(September 17, 2007)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Plaintiff Thomas D. Arthur is an Alabama death row inmate scheduled for execution by lethal injection on 27 September, 2007. On 17 April, 2007, the State of Alabama ("Alabama") filed its motion to set an execution date. On 14 May, 2007, Arthur filed a 42 U.S.C. § 1983 complaint in the United States District Court for the Southern District of Alabama, challenging Alabama's method of execution. On 22 June, 2007, the Alabama Supreme Court granted Alabama's motion, and set the execution date for 27 September, 2007. Alabama moved to dismiss the complaint on 25 June, 2007, alleging that Arthur's complaint was barred by the statute of limitations, laches, or for failure to state a claim upon which relief could be granted. The district court granted Alabama's motion on the basis of laches. *Arthur v. Allen*, No. 07-0342, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007) ("*Arthur*"). Arthur timely appealed. After an expedited briefing schedule, we affirm the district court's judgment dismissing Arthur's § 1983 action.

I. BACKGROUND

The details of Arthur's offense are set forth in our opinion affirming the district court's judgment denying Arthur federal habeas relief. *See Arthur v. Allen*, 452 F.3d 1234 (11th Cir.), *modified on reh'g*, 459 F.3d 1310 (11th Cir. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 2033 (2007). Briefly, in 1982, Arthur, while serving a sentence for murder in the second degree and assigned to a work release center, murdered Troy Wicker, the husband of one of Arthur's paramours, by shooting Wicker through the

right eye, while he was asleep, with a .22 caliber pistol.

Arthur was indicted for murder, convicted, and sentenced to death by electrocution in 1982. His conviction and sentence were affirmed by the Alabama Court of Appeals, *Arthur v. State*, 472 So. 2d 650 (Ala. Crim. App. 1984), but reversed by the Alabama Supreme Court because the trial court had improperly permitted evidence of Arthur's prior murder conviction. *In re Arthur*, 472 So. 2d 665, 668-70 (Ala. 1985). The case was remanded for a new trial. *Arthur v. State*, 472 So. 2d 670 (Ala. Crim. App. 1985). In 1987, Arthur was again convicted and sentenced to death. His conviction was reversed, however, because of the admission of Arthur's statement to the police after he had invoked his right to remain silent. *Arthur v. State*, 575 So. 2d 1165, 1171-75 (Ala. Crim. App. 1990), *cert. denied*, *In re Arthur*, 575 So. 2d 1191 (Ala. 1991) (per curiam). In 1991, Arthur was indicted and convicted of murder for pecuniary gain. Arthur was sentenced to death in 1992. His conviction and sentence were affirmed. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996), *affirmed*, *In re Arthur*, 711 So. 2d 1097 (Ala. 1997). He did not file a petition for writ of certiorari to the United States Supreme Court.

Approximately twenty-nine months later, in September 2000, Alabama filed a motion with the Alabama Supreme Court to set an execution date. In January 2001, Arthur filed a petition for postconviction relief with the state trial court. The petition, however, was dismissed as untimely because of a mandatory two-year limitations period required by Alabama Rule of Criminal Procedure 32.2(c), and that decision was affirmed. *Arthur v.*

State, 820 So. 2d 886, 888-90 (Ala. Crim. App. 2001) (per curiam), *cert. denied*, *Arthur v. Alabama*, 535 U.S. 1053, 122 S. Ct. 1909 (2002). Arthur's execution date was set for 27 April, 2001. *Ex parte Arthur*, 821 So. 2d 251 (Ala. 2001).

On 20 April, 2001, Arthur filed a federal petition for writ of habeas corpus. The district court granted a stay of execution and we denied a motion to vacate the stay. *Arthur v. Haley*, 248 F.3d 1302, 1303 (11th Cir. 2001) (per curiam). In July 2002, while Arthur's federal habeas petition was pending, the Alabama legislature changed Alabama's method of execution from electrocution to lethal injection. The new statute gave death-row inmates 30 days to elect electrocution instead. After that period of time, Alabama's sole method of execution would be lethal injection. *See* Ala. Code § 15-18-82.1 (2006 Cumulative Supp.).

The federal district court dismissed Arthur's habeas petition but granted a certificate of appealability. We affirmed the district court's denial of habeas relief in 2006, and the Supreme Court denied his petition for writ of certiorari on 16 April, 2007. The Alabama Supreme Court subsequently entered the order setting the date of execution.

II. DISCUSSION

Arthur's § 1983 action challenged Alabama's three-drug lethal injection protocol for violating the Eighth Amendment's prohibition against cruel and unusual punishment, and sought injunctive and declaratory judgment to prevent Alabama's use of the lethal injection procedure. The district court dismissed Arthur's § 1983 challenge, finding that

Arthur delayed unnecessarily in bringing his lethal injection challenge. On appeal, Arthur contends that the district court erred in applying the "specialized equitable principles" for laches and in dismissing his complaint based on these principles without a clear standard for measuring the timeliness of his lethal injection challenge. We disagree.

"[We] review the district court's dismissal of a § 1983 method-of-execution challenge [under the doctrine of laches] for abuse of discretion." *Grayson v. Allen*, 491 F.3d 1318, 1321 n.2 (11th Cir.), *cert. denied*, __ U.S.__, __ S. Ct.__, 2007 WL 2086662, 76 U.S.L.W 3049 (Jul. 26, 2007). "'[T]he equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges are equally applicable to requests for both stays and injunctive relief' and are 'not available as a matter of right.'" *Williams v. Allen*, ___ F.3d ___, 2007 WL 2368028 at *2 (11th Cir. 2007) (quoting *Grayson*, 491 F.3d at 1322). Those equitable principles include (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the plaintiff's satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits." *Hill v. McDonough*, __ U.S. __, __, 126 S. Ct. 2096, 2104 (2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126). The strong interest of the State and the

victims's families is "the timely enforcement of a sentence", *id.* at __, 126 S. Ct. at 2104, which acquires "an added moral dimension" once post-trial proceedings finalize. *Calderon v. Thompson*, 523 U.S. 538, 556 118 S. Ct. 1489, 1501 (1998).

A. Application of Specialized Equitable Principles for Laches

Arthur contends that the district court erred by applying the specialized equitable principles instead of applying the elements of laches or the proper legal standards for a Federal Rule of Civil Procedure Rule 12 dismissal. He maintains that we have not replaced the doctrine of laches with specialized equitable principles and that such a dismissal requires a fact-specific inquiry inappropriate on a motion to dismiss. He argues that his action, which was filed four months before his scheduled execution, was filed sufficiently in advance to permit limited discovery on his purported delay and the alleged prejudice to the State and the victim's family.

Relying upon the analysis set forth in *Rutherford v. McDonough*, 466 F.3d 970 (11th Cir.), *cert. denied*, U.S. . 127 S. Ct. 465 (2006), and *Grayson*, the district court found that Arthur had unreasonably delayed in filing his § 1983 action. In considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff "delayed unnecessarily in bringing the claim, . . . knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished" within the short period of time between filing and the scheduled execution date. *Rutherford*, 466 F.3d at 974 (also citing and quoting

Hill, __ U.S. at __, 126 S. Ct. at 2104 ("The federal courts can and should protect States from dilatory . . . suits" or "suits . . . filed too late in the day."); *see also Grayson*, 491 F.3d at 1321 ("[C]ourts considering dismissal of a dilatory § 1983 suit seeking injunctive relief should recognize the 'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay" (quoting *Rutherford*, 466 F.3d at 974 (quoting *Hill*, U.S. at __, 126 S. Ct. at 2104))); *Williams*, __ F.3d at __, 2007 WL 2368028 at *4 ("[T]he district court did not abuse its discretion in dismissing Williams's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief.").

As the district court concluded, Arthur is unable to defeat the State's motion to dismiss. Any claim of reasonable ignorance of the State's lethal injection protocol is belied by Arthur's complaint in which he alleged, based on "information and belief," that Alabama uses the three-drug cocktail, specifically identified as Thiopental, Pavulon, and potassium chloride, and his acknowledgment that a number of Alabama cases were filed in the summer and fall of 2006 alleging that Alabama used the same three-drug cocktail. R-1 at 6-7; *Arthur*, slip op. at __, 2007 WL 2320069 at *2; *see e.g.*, *Jones v. Allen*, 485 F.3d 635, 641 n.3 (11th Cir.), *cert. denied*, __ U.S. __, 127 S. Ct. 2160 (2007); *Grayson*, 491 F.3d at 1323; *Williams*, __ F.3d at__, 2007 WL 2368028 at *3. Further, nothing precluded Arthur from filing a § 1983 challenge to our circuit precedent mandating that method-of-execution claims be raised only in a habeas petition. *See Williams*, __ F.3d at __, 2007

WL 2368028 at *2 (citing *Grayson*, 491 F.3d at 1322). Arthur did not file his § 1983 action until almost 16 months after the Supreme Court granted *certiorari* in *Hill v. Crosby*, 546 U.S. 1158, 126 S. Ct. 1189 (2006), and almost 11 months after the Supreme Court clarified in *Hill* that inmates could file § 1983 challenges to a state's execution procedures. Although "the equitable considerations in each case are naturally different," even if Arthur would have been entitled to a decision on the merits if he had brought his suit in time to allow consideration of the merits without the entry of a stay, the strong presumption against a stay operates against him. *See Jones*, 485 F.3d at 641 n.4.

B. Standards for Timeliness of a Lethal Injection Challenge

Arthur argues that, if specialized equitable principles apply, the equities weigh in favor of Arthur litigating the merits of his case and against dismissal. He asserts that the standards for the timeliness of his challenge are novel and undefined. He maintains that his complaint was prompt by reasonable standards because it was filed in less than a month after the Supreme Court denied certiorari on his federal habeas corpus petition and before the Alabama Supreme Court had set an execution date.

The district court noted that we have "declined to determine precisely when [a § 1983 method-of-execution challenge] becomes ripe, but [we] ha[ve] clearly rejected the notion that denial of certiorari is required," and concluded that Arthur unreasonably delayed filing his action when he did not file for nine months after we had denied relief in his federal

habeas action in August 2006. *Arthur*, slip op. at __, 2007 WL 2320069 at 4.

In rejecting similar challenges, we have held that waiting until the Supreme Court has denied certiorari review of a federal habeas petition or even until a certiorari petition has been pending for over three months, *Jones*, 485 F.3d at 640 n.2, or "until after the State file[s a] motion to set the execution date is too late to avoid the inevitable need for a stay of execution" and is too late to allow for a full adjudication of the merits of his action. *See Williams*, __ F.3d at __, 2007 WL 2368028 at *2.

Arthur's § 1983 action was filed before his execution date was set but was filed only four months before the execution date was ultimately set. In Alabama, "it is common practice for the State to ask the Alabama Supreme Court to set an execution date for a death row inmate shortly after the United States Supreme Court has denied certiorari review of the [inmate's] federal habeas petition. *Williams*, __ F.3d at __, 2007 WL 2368028 at *2 (citing *Jones*, 485 F.3d at 639 n.2). When Arthur filed his petition for writ of certiorari in the Supreme Court on 11 January, 2007, it was clear that a denial of the petition would remove the final obstacle to lifting the stay of execution. Once the stay was lifted, execution could be set in as few as 30 days. *See* Ala. R. App. P. 8(d)(1); *see also Jones*, 485 F.3d at 639 n.2. As the district court noted, four months is not enough time for this case to be fully adjudicated. *See Arthur*, slip op. at __, 2007 WL 2320069 at *4 and n.6. Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006, as a result of the Supreme Court's

decision in *Hill*, or August 2006, as a result of other filed Alabama actions.[10]

III. CONCLUSION

We conclude that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief. There was no justification for Arthur's failure to bring his lethal injection challenge earlier to allow sufficient time for full adjudication on the merits of this claim. Accordingly, the district court's judgment of dismissal is **AFFIRMED**.

---

[10] Following the *Hill* decision and clarification that a method-of-execution challenge was to be filed as a § 1983 action and not as a petition for writ of habeas corpus, there was no impediment to Arthur seeking relief under § 1983 during the pendency of his habeas corpus petition. *See Nelson v. Campbell*, 541 U.S. 637, 643, 124 S. Ct 2117, 2122 (2004); *Grayson*, 491 F.3d at 1323; *Williams*, __ F.3d at __, 2007 WL 23688028 at *2.

BARKETT, Circuit Judge, dissenting:

I dissent believing it to be error for the district court to refuse to hear an Eighth Amendment challenge to Alabama's lethal injection protocol simply because the § 1983 petitioner failed to file his claim as soon as the Alabama legislature changed Alabama's method of execution to lethal injection. *See also Williams v. Allen*, No. 07-13638 at *5, ---F.3d---, 2007 WL 2368028 (11th Cir. Aug. 21, 2007) (Barkett, J., dissenting).

First, it is wholly unreasonable to expect an inmate to have predicted scientific data—only recently available—that suggests that inadequacies in the three-drug protocol inflict "cruel and unusual punishment" as proscribed by the Eighth Amendment. *See id.* Assuming *arguendo* that the three-drug protocol *does* violate the Eighth Amendment, and that the scientific evidence that showed this did not come into existence until some time after Alabama adopted the protocol, the practical effect of our law in this area is to knowingly permit the *unconstitutional* execution of several inmates, simply because the inmates had the misfortune of being sentenced to death *before* the scientific data revealing the constitutional infirmity of such executions could have been known. This is patently unacceptable. Indeed, the Constitution forbids the *infliction* of "cruel and unusual punishment" at the time of its imposition, regardless of the circumstances at the time the death penalty *sentence* was imposed.

Second, I continue to find untenable the suggestion that the petitioner "should have *anticipated* the denial of all relief and filed this case prior to the determination of his pending case." *See*

id. (emphasis in original). Indeed, even the State of Alabama itself is not so bold and therefore will not set an execution date until *after* the United States Supreme Court denies certiorari review of an inmate's federal habeas petition. *See Jones v. Allen*, 485 F.3d 635, 639 n.2 (11th Cir. 2007).

For these reasons, I dissent.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Plaintiff/Counter-Defendant,	)	
v.	)	Case No. 2:06-cv-695-WKW
J, et al.	)	
Defendants/Counter-Plaintiffs.	)	

AN,	)	
Plaintiff/Counter-Defendant.	)	
v.	)	Case No. 2:06-cv-919-WKW
J, et al.	)	
Defendants/Counter-Plaintiffs.	)	

ORDER ON PRETRIAL HEARING

It is ORDERED that:

1. The trial of this matter, which is to last three days, is CONTINUED from October 2, 2007, to October 3, 2007, at 9:00 a.m., in courtroom 2-E,

Frank M. Johnson, Jr. U.S. Courthouse Complex, One Church Street, Montgomery, Alabama.

2. This case is set for a final pretrial hearing as provided by Rule 16 of the Federal Rules of Civil Procedure, on **October 2, 2007, at 10:00 a.m.**, in courtroom 2-E, Frank M. Johnson, Jr. U. S. Courthouse Complex, One Church Street, Montgomery, Alabama.

ALL TRIAL ATTORNEYS must appear at the time above designated and be fully prepared and authorized to admit all facts that are true. Any pending motions shall be heard at this time; thus, counsel should be prepared to present oral argument.

3. The parties shall immediately issue trial subpoenas, if any. Any motions to quash shall be filed **on or before September 14, 2007.**

4. Court is open. Should either party wish to close the courtroom or otherwise deny, in whole or in part, public access to evidence taken at trial, that party shall file a motion, fully briefed with case citations thereon, **on or before September 14, 2007.** The non-moving party shall file a responsive brief **on or before September 21, 2007.** Reply briefs will not be accepted.

5. The parties shall exchange Rule 26(a)(3) information **on or before September 14, 2007.** The parties shall then exchange Rule 26(a)(3) objections to depositions designations and to admissibility of evidence on or before **September 19, 2007.** The parties shall then confer to resolve any objections. **On or before September 24, 2007,** the plaintiffs shall file the JOINTLY prepared witness list, list of deposition designations, and exhibit list, with objections disclosed thereon. If objections are not so disclosed, other than objections under Rule 402 and

403 of the Federal Rules of Evidence, objections are waived unless excused by the court for good cause.

6. Motions in limine, if any, shall be filed **on or before September 24, 2007.** Responses to any motions shall be filed **on or before September 28, 2007.** Reply briefs will not be accepted.

7. The parties shall JOINTLY prepare a list of stipulations of facts. The plaintiffs shall file this document **on or before September 26, 2007.**

8. The parties shall each prepare a summary of their contentions and shall each file the summary **on or before September 26, 2007.**

9. The parties are not required to file trial briefs before the trial, but if they choose to do so, the briefs shall be filed **on or before September 28, 2007.**

In lieu of closing arguments, the parties shall file briefs after trial. The plaintiffs shall file their closing brief, with proposed findings of fact and conclusions of law, **on or before October 9, 2007.** The defendants shall file their responsive brief, with proposed findings of fact and conclusions of law, **on or before October 12, 2007.** The plaintiffs may file a reply brief **on or before October 15, 2007.**

10. At the October 2, 2007 final pretrial hearing, the parties shall each submit three binders of copies of the pre-marked exhibits for use by the court (judge, law clerk, and courtroom deputy).

11. The parties shall review and comply with the Middle District of Alabama's Order on the E-Government Act.

12. The parties shall notify Chambers of the undersigned **on or before September 14, 2007,** regarding any mediation efforts undertaken.

13. The parties have indicated that there are no other disputes at this time. All understandings,

agreements, and deadlines contained in this Order and discussed at the September 5, 2007 pretrial conference shall be binding on all parties unless modified by the Court.

DONE this 7th day of September, 2007.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

STATE OF ALABAMA §
§
MONTGOMERY COUNTY §

PROFESSIONAL SERVICES CONTRACT

BETWEEN THE ALABAMA OFFICE OF THE ATTORNEY GENERAL

AND

MARK DERSHWITZ, M.D., Ph.D.

CONTRACT NUMBER: C8053003

Because of an identifiable need to acquire professional services for an expert witness on behalf of the Office of the Attorney General (hereinafter referred to as the Department) to testify or prepare affidavits in cases that challenge the lethal injection method of execution or its effect on State defendants, Mark Dershwitz, M.D., Ph.D. (hereinafter referred to as the Contractor) and the Department have entered into a contract for the provision of such services effective upon approval by the Governor.

WHEREAS, The Department has statutory authority to enter into contracts with any private person, organization, or group; and

WHEREAS, the Department has a need for the professional services;

NOW, therefore, the Department and the Contractor, intending to be mutually bound and in consideration of the mutual covenants and stipulations set out herein, agree as follows:

I. **Services to be provided:**

The Contractor possesses a high degree of professional skill in pharmacology and anesthesiology. The Contractor, in addition to being a licensed medical doctor, also holds a Ph.D. in pharmacology and is licensed by the American Board of Anesthesiology.

The Contractor will review the chemical composition of drugs used in lethal injections administered to State capital murder defendants during the execution process. After such review, the Contractor will provide expert consultation to the Department and provide affidavits and/or expert testimony, if needed. The Contractor will perform such services when cases challenge the use of lethal injection and/or the effect of lethal injections on State defendants. Affidavits and/or expert testimony may be necessary to adequately represent the State, because the defendants retain experts whose opinions and/or testimony will need to be rebutted.

II. **Period of Contract:**

The terms of this contract shall begin on October 1, 2007 or the date of final approval by the Governor, whichever occurs later. At that time, the Contractor will commence performance of the contract and shall complete performance on or before September 30, 2009.

The Contractor acknowledges and understands that this contract is not effective until it has received all requisite state government approvals and the Contractor shall not begin performing work under this contract until notified to do so by the Department. The Contractor is entitled to no compensation for work performed prior to the effective date of this contract.

III. **Termination of Contract:**

A. The contract may be terminated at any earlier date upon mutual agreement of the parties, or upon ten days written notice by one of the contracting parties to the other contracting party.

1. The Contractor will cease work upon receipt of the Department's termination notice, and all costs incurred prior to the issuance and receipt of cancellation shall be paid by the Department.

2. It is expressly understood and agreed by the parties hereto that the Department shall, in all events, anything herein to the contrary notwithstanding, have the option to terminate this Contract at the end of any fiscal year of the State of Alabama so as not to be obligated under the terms herein for the following fiscal year.

IV. **Financial Arrangements:**

A. The parties hereto agree that this Contract is a Fee for Services Contract and that the sum total of the professional services to be provided during the operation of this Contract

shall not exceed twenty thousand dollars ($20,000) to include expenses of no more than three thousand dollars ($3,000).

1. The Department shall pay the Contractor for services rendered on a case by case basis as invoiced after the services are performed at the rate of four hundred dollars ($400) per hour for review, research, writing, and/or travel time.

2. The Department shall pay the Contractor a flat fee of three thousand dollars ($3,000) for each day that the Contractor actually provides expert testimony on behalf of the State. Payment for these services will be made as invoiced after the services are performed.

2. Travel authorized by the Department shall be reimbursed at the standard rates paid to State employees, but in no event shall travel expenses under this Agreement exceed three thousand dollars ($3,000).

3. In the event of cancellation of the contract by either party, payment shall be made as specified in Paragraph III.A.1 above.

B. The Contractor shall submit an itemized written statement or invoice for services provided during the course of the contract on a case by case basis. Such statement or invoice shall be submitted to the Department in triplicate

V. Merit System Benefits Excluded:

It is further understood that the Contractor is an independent contractor; and, as such is not entitled to the benefits of the State Merit System Act for any work which is done for the Department under any terms of this Agreement.

VI. Findings Confidential:

Any reports, information, data, etc., given to or prepared or assembled by the Contractor under this Agreement which the Department requests to be kept as confidential shall not be made available to any individual or organization by the Contractor without the prior written approval of the Department, unless such confidentiality would be contrary to the laws of the State of Alabama or the United States.

VII. Coordination Contact:

The Department agrees to designate a single source contact for the purpose of coordination and problem solving during the terms of this contract. The designation shall be made in writing immediately after the signatures to the agreement have been obtained.

VIII. Equal Employment Opportunity:

There shall be no discrimination against any employee who is employed in the work covered by this Agreement, or against any applicant for such employment, because of race, color, religion, sex, national origin, age or disability. This provision shall include, but not be limited

to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship.

IX. Alternative Dispute Resolution

For any and all disputes arising under the terms of this agreement, the parties hereto agree, in compliance with the recommendations of the Governor and Attorney General, when considering settlement of such disputes, to utilize appropriate forms of non-binding alternative dispute resolution including, but not limited to, mediation through the Attorney General's Office of Administrative Hearings or where appropriate, private mediators.

X. Availability of Funds:

This Agreement is conditional upon the receipt of sufficient funds from the Alabama Legislature.

XI. Not to Constitute a Debt of the State:

Under no circumstances shall the commitments by the Department contained herein constitute a debt of the State of Alabama as prohibited by Section 213 of the Constitution of Alabama 1901, as amended by Amendment 26. It is further agreed that if any provision of this contract shall contravene any statute or constitutional provision or amendment, either now in effect or which may, during the course of this contract, be enacted, then that conflicting provision in the contract shall be deemed null and void. The Contractor's sole remedy for the

settlement of any and all disputes arising under the terms of this agreement shall be limited to the filing of a claim with the Board of Adjustment for the State of Alabama.

XII. **Proration Cancellation Clause**

In the event of the proration of the fund from which payment under this contract is to be made, the contract will be subject to termination.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement on this 23rd day of July, 2007.

ALABAMA OFFICE OF THE ATTORNEY GENERAL

/s/ Troy King
Troy King
Attorney General

CONTRACTOR:

/s/ Mark Dershwitz
Dr. Mark Dershwitz

FEIN or SS# 381-62-4876

APPROVED:

_____
Bob Riley

Governor of Alabama

Panel Approves $400-an-hour Contract For Expert Witness

WVTM-TV

MONTGOMERY, Ala. (AP) · A legislative panel today approved a contract for the state to pay $400 an hour to a Massachusetts physician to analyze the combination of drugs used in Alabama executions.

The head of the attorney general's death penalty division, Clay Crenshaw, has said Dr. Mark Dershwitz could be called as a witness for the state in the trial of a lawsuit filed by death row inmates Willie McNair and James Callahan.

That case is scheduled to be tried October 2nd in federal court in Montgomery.

McNair and Callahan claim lethal injection can be painful and violates the U.S. Constitution's mandate against cruel and unusual punishment.

Dershwitz is a University of Massachusetts professor of anesthesiology who has been an expert witness on behalf of several states, defending their lethal injection methods against constitutional challenges.

URL: http://www.msnbc.msn.com/id/20641754/

MSN Privacy . Legal
© 2007 MSNBC.com